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NOT FOR PUBLICATION

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Ronald G. Harris, Jr., Plaintiff, vs. Graham Enterprises, Inc., f/k/a Rodeo Nights, a corporation; Graham Brothers Entertainment, Inc.; CG Management and Promotion, Inc.; Richard Egan; Roger Gearhart, Defendants.	No. CV-08-340-PHX-FJM **ORDER**

Ronald Harris brings this action against his former employer, Graham Enterprises, Inc. ("Graham Enterprises"), and associated parties alleging racial discrimination and retaliation in violation of federal law. We have before us Graham Enterprises' motion for summary judgment (doc. 37), Graham Brothers Entertainment, Inc. ("Graham Brothers"), CG Management & Promotion, Inc. ("CG"), Richard Egan, and Roger Gearhart's motion for summary judgment (doc. 38), and defendants' joint statement of facts (docs. 39). We also have before us plaintiff's responses, separate statement of facts, and notice of filing exhibit 13 (docs. 43, 44, 45, & 46 respectively), and defendants' replies and joint objections to plaintiff's separate statement of facts (docs. 47, 48 & 49 respectively). The court also has before it plaintiff's amended motion for leave to file a response to defendants' objections to

plaintiff's statement of facts and evidence (doc. 52), defendants' joint response (doc. 56), and plaintiff's reply (doc. 57).

As an initial matter, we deny plaintiff's motion for leave to file a response to defendants' objections. The rules of civil procedure provide for a motion, response, and reply, and we see no need to extend beyond that point in this case. LRCiv. 7.2. We remind the parties that we will not consider any issues raised for the first time by defendants' replies. Gadda v. State Bar of Cal., 511 F.3d 933, 937 n.2 (9th Cir. 2007).

I

Plaintiff is a Black male who worked as a night club security guard for Graham Enterprises beginning in June 2004. In July 2005, the club's general manager left and the assistant manager, Devon Watt, was promoted to the position. Plaintiff claims three non-Black people were offered the assistant manager position vacated by Watt even though the opening was not posted. Plaintiff allegedly asked Watt why he had not been offered the position and was told that he did not have the necessary qualifications. The assistant manager position was never filled.

On August 17, 2005, plaintiff filed a complaint with the Equal Employment Opportunity Commission ("EEOC") claiming that he was not offered the assistant manager position because of his race. On August 26, 2005, plaintiff was suspended without pay for insubordination. Based on his suspension, plaintiff filed a charge of retaliation with the EEOC on August 29, 2005. After filing the charge, plaintiff spoke with Gearhart, president of Graham Brothers, and was allegedly told he could return to work if he dropped his discrimination claim. Plaintiff refused and did not return to work. The club closed in November 2005.

On July 31, 2007, the EEOC issued a reasonable cause determination on plaintiff's charge of retaliation. PSOF, Ex. 6. Plaintiff brings this action claiming: (1) racial discrimination in violation of Title VII of the civil rights act of 1964, 42 U.S.C. § 2000e, *et seq.* ("Title VII") by Graham Enterprises, Graham Brothers, and CG; (2) retaliation in

violation of Title VII by Graham Enterprises, Graham Brothers, and CG; and (3) racial discrimination and retaliation in violation of 42 U.S.C. § 1981 by all defendants. Defendants move for summary judgment on all claims.

II

Defendants first claim that plaintiff has failed to show sufficient evidence of disparate treatment on account of his race in violation of Title VII and 42 U.S.C. § 1981. The standard analysis under a Title VII disparate treatment case is the same as that under Section 1981. Gay v. Waiters' and Dairy Lunchmen's Union, Local No. 30, 694 F.2d 531, 538 (9th Cir. 1982). We apply the McDonnell Douglas burden shifting analysis. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817 (1973). Plaintiff has the initial burden to show a prima facie case of discrimination, which defendants may then rebut by providing a "legitimate, nondiscriminatory reason" for the disparate treatment. Odima v. Westin Tucson Hotel Co., 991 F.2d 595, 599 (9th Cir. 1993) (citation omitted). If defendants provide such a reason, plaintiff must establish that the defendants' reason is a pretext for discrimination. Id. Despite the intermediate burden of production shifting, the ultimate burden of proving discrimination remains with plaintiff at all times. Texas Dept. of Cmty. Affairs v. Burdine, 450 U.S. 248, 253, 101 S. Ct. 1089, 1094 (1981).

Defendants argue that plaintiff has failed to show a prima facie case of discrimination because he cannot show that there was an open position. We agree. To establish a prima facie case using indirect evidence, plaintiff must show that: "(1) [he] is a member of a protected class; (2) [he] applied for a job for which [he] was qualified; (3) [he] was rejected; and (4) the position remained open and the employer sought other similarly-qualified employees." Surrell v. California Water Serv. Co., 518 F.3d 1097, 1105 (9th Cir. 2008) (citing McDonnell Douglas, 411 U.S. at 802, 93 S. Ct. at 1824). "'[T]he failure to prove the existence of a job opening' is a failure as a matter of law to make out a prima facie case of disparate treatment under McDonnell Douglas." Gay, 694 F.2d at 548 (quotation omitted). Plaintiff does not dispute that the assistant manager position was neither advertised nor filled.

Plaintiff claims that the assistant manager position was available because it was offered to three non-Black employees. Plaintiff has not, however, submitted sufficient evidence to support his contention. He relies only on his own statement and has not provided an affidavit from any of the three employees allegedly offered the position. Plaintiff's testimony regarding the out of court statements of the three employees is hearsay, which we may not consider in a motion for summary judgment. Fed R. Evid. 801; Orr v. Bank of Am., 285 F.3d 764, 773 (9th Cir. 2002) ("A trial court can only consider admissible evidence in ruling on a motion for summary judgment.") (citations omitted). Without evidence that a job opening actually existed, plaintiff has failed to show a prima facie case. We will, therefore, grant defendants' motion for summary judgment as to plaintiff's racial discrimination claims.

III

Defendants also claim plaintiff has failed to show unlawful retaliation pursuant to Title VII or 42 U.S.C. § 1981. The McDonnell Douglas burden shifting framework may also be applied to plaintiff's retaliation claims. McGinest v. GTE Serv. Corp., 360 F.3d 1103, 1124 (9th Cir. 2004); Surrell, 518 F.3d at 1108-09. To establish a prima face case of retaliation, plaintiff must show: "(1) that he acted to protect his Title VII rights; (2) that an adverse employment action was thereafter taken against him; and (3) that a causal link existed between the two events." McGinest, 360 F.3d at 1124. Defendants do not challenge the first two prongs of the test, but argue that plaintiff cannot show a causal link between the filing of his EEOC claim and his suspension. We disagree.

The timing of plaintiff's suspension alone is sufficient to show causation in this case. "[C]ausation can be inferred from timing alone where an adverse employment action follows on the heels of protected activity." Villiarimo v. Aloha Island Air, Inc., 281 F.3d 1054, 1065 (9th Cir.2002). Plaintiff was suspended only nine days after filing his EEOC charge for discrimination; this close proximity creates an inference of causation. See Yartzoff v. Thomas, 809 F.2d 1371, 1376 (9th Cir. 1987) (finding that causation could be inferred from

timing where actions were taken less than three months after administrative complaint was filed).

Because plaintiff has shown a prima facie case of retaliation, defendants must articulate a non-retaliatory reason for his suspension. Defendants claim plaintiff was suspended for telling a co-worker that no one "could touch him" and that he planned to receive a large payment for his racial discrimination claims. Plaintiff denies making these statements. Even if we accept defendants' articulated reason for plaintiff's suspension, plaintiff has shown enough evidence to create a triable issue regarding pretext. The only evidence of plaintiff's allegedly disruptive behavior offered by defendants is the declaration of the person who suspended plaintiff. DSOF, Ex. B. Moreover, plaintiff's supervisors attest to the fact that he had been a good employee with no disciplinary problems before August 26, 2005. DSOF, Ex. B ¶ 3; DSOF, Ex. C ¶ 4. A reasonable jury may conclude that defendants' reason is a pretext for discrimination. Summary judgment on this issue is, therefore, inappropriate.[1]

IV

Finally, Egan, Gearhart, Graham Brothers, and CG argue that they may not be held liable because plaintiff has not shown that they had any role in the allegedly retaliatory conduct. We disagree. According to the position statement submitted by Graham Enterprises during the EEOC investigation, Egan was informed about plaintiff's alleged comments regarding his EEOC claim and instructed that plaintiff be suspended PSOF, Ex. 4. The position statement also confirms that Gearhart spoke with plaintiff regarding his suspension on August 29, 2005. Id. Plaintiff alleges Gearhart told him during this conversation that he could return to work if he dropped his EEOC claim. PSOF, Ex. 2 at 110-11. It would,

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[1]Graham Enterprises argues that plaintiff's damages should be limited to those incurred between the date he was suspended, August 26, 2005, and the date that the club was closed, November 30, 2005. Because we agree with plaintiff that a factual issue remains as to whether he would have been offered or accepted a transfer to an affiliated night club, we will not limit his potential damages at this time.

therefore, be reasonable to conclude that Egan and Gearhart had knowledge of the EEOC claim and were involved with the alleged retaliatory conduct.

As to Graham Brothers and CG, a parent corporation will not be liable for the discriminatory conduct of a subsidiary unless it has "'some peculiar control over the employee's relationship with the direct employer'" and "engage[s] in 'discriminatory interference.'" E.E.O.C. v. Pacific Maritime Ass'n, 351 F.3d 1270, 1274 (9th Cir. 2003) (quotation omitted). Egan's pay stubs show that during 2005, when he ordered plaintiff's suspension, he was employed by both Graham Brothers and CG.[2] PSOF, Ex. 9. Gearhart was the president of Graham Brothers during the same period. PSOF, Ex. 10. Graham Brothers and CG, therefore, exercised control over Graham Enterprises' employment decisions, including its relationship with plaintiff, through Egan and Gearhart.[3]

Graham Brothers and CG also contend that they are not 'employers' within the meaning of Title VII because plaintiff has not shown that either employs more than fifteen people. 42 U.S.C. § 2000e(b). Plaintiff argues that Graham Enterprises, Graham Brothers, and CG operated as integrated enterprises and, therefore, their employees should be combined to meet the statutory minimum.[4] Two entities will be treated as integrated

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[2]Defendants object to this evidence because it was not timely disclosed. Although plaintiff may not have included these documents in their initial disclosures, defendants are not prejudiced. The challenged exhibits contain information that was in defendants' control and does not create any unfair surprise. We will, therefore, consider the exhibits that plaintiff submitted.

[3]Graham Brothers, and CG claim that they may not be held liable under Title VII because they were not named in plaintiff's EEOC charge. EEOC charges are to be construed liberally and "charges can be brought against persons not named in an EEOC complaint as long as they were involved in the acts giving rise to the EEOC claims." Wrighten v. Metro. Hosps., Inc., 726 F.2d 1346, 1352 (9th Cir. 1984) (citation omitted). Based on our conclusion that Graham Brothers and CG were involved in the decision to suspend plaintiff, we will consider plaintiff's claims exhausted.

[4]The parties do not dispute that the aggregated total is over the fifteen person minimum.

enterprises if they have: "(1) interrelated operations; (2) common management; (3) centralized control of labor relations; and (4) common ownership or financial control." Morgan v. Safeway Stores, Inc., 884 F.2d 1211, 1213 (9th Cir. 1989). Plaintiff's evidence shows that Graham Enterprises, Graham Brothers, and CG had common officers and managers, centralized hiring, and common ownership. We will, therefore, consider Graham Enterprises, Graham Brothers, and CG a single employer for purposes of the fifteen employee minimum.

V

Accordingly, **IT IS ORDERED DENYING** plaintiff's motion for leave to file response to defendants' objections to plaintiff's statement of facts and evidence in opposition to defendants' motions for summary judgment (doc. 52).

IT IS ORDERED GRANTING IN PART AND DENYING IN PART defendant Graham Enterprises' motion for summary judgment (doc. 37). The motion is granted as to plaintiff's Title VII and 42 U.S.C. § 1981 racial discrimination claims and denied as to all other claims.

IT IS FURTHER ORDERED GRANTING IN PART AND DENYING IN PART defendants Graham Brothers, CG, Egan, and Gearhart's motion for summary judgment (doc. 38). The motion is granted as to plaintiff's Title VII and 42 U.S.C. § 1981 racial discrimination claims and denied as to all other claims.

Plaintiff's Title VII retaliation claim against Graham Enterprises, Graham Brothers, and CG and plaintiff's and 42 U.S.C. § 1981 retaliation claim against all parties survive.

DATED this 10th day of March, 2009.

Frederick J. Martone

Frederick J. Martone
United States District Judge